F. G. Lieb Construction Co. *and* Laborers' Local 17, Laborers' International Union of North America, AFL–CIO. Case 3–CA–17033

August 31, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On May 31, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached supplemental decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, F. G. Lieb Construction Co., Cincinnatus, New York, its officers, agents, successors, and assigns shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Cohen finds it unnecessary to pass on the judge's alternative conclusion that, assuming Brown, Tracey, and Suarez are supervisors, the Respondent is nonetheless liable for the payments to the union funds on their behalf because they would be covered by the collective-bargaining agreement as working foremen.

Alfred M. Norek, Esq., for the General Counsel.
Jerold C. Feuerstein, Esq. (Jason & Nesson), for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This matter was heard by me on April 5, 1995, in Albany, New York. The Board issued its Decision and Order in the underlying matter on May 28, 1993, at 311 NLRB 810. On January 28, 1994, the United States Court of Appeals for the Second Circuit entered a consent judgment enforcing in full the provisions of the Board's Decision and Order. A dispute having arisen over the amount due under the Board's Decision and Order, the Region issued a compliance specification dated September 27, 1994.

In the underlying case, the Board found that F. G. Lieb Construction Company (Respondent) violated Section 8(a)(1) and (5) of the Act by failing to continue in force and effect certain terms and conditions of employment contained in the collective-bargaining agreement that Respondent entered into with Laborers' Local 17, Laborers' International Union of North America, AFL–CIO (the Union). More particularly, it was found that Respondent had failed to make the contractually required contributions to the Union's Health Benefit Fund, Pension Fund, Training/Education Fund, Laborers-Employers Cooperation and Education Trust Fund (the L.E.C.E.T. Fund), and the Savings Fund, all of which, at times, shall collectively be referred to as the funds, for certain of its employees at a large job that it was performing in Napanoch, New York (the jobsite), for Westinghouse Environmental (Westinghouse). There is no disagreement herein on the backpay period, the funds involved, or the amount due to the funds for each employee. The only dispute is for which employees these amounts are due. The compliance specification, as amended at the hearing,[1] alleges that contributions should have been, but were not, made for the following employees: Tracey Brown, Travis Brown, Norman Durand, Fred Eaton, Shannon Eaton, Kevin Livemore, Homer Lum, Tommy Lum, Joe Randall, Michael D. Rice, Erik Roos, John Sinesi, Michael Stafford, Carl Suarez, and Wendell Tracey. Respondent objects to the inclusion of three of these individuals, Tracey Brown, Carl Suarez, and Wendell Tracey, all, allegedly, because they are supervisors within the meaning of the Act. As Respondent bears the burden of minimizing its backpay obligations and has introduced no evidence bearing on the remaining 12 employees, it is found that they were covered by the contract applicable to the work at the facility, and that Respondent is obligated to make the designated payments to the funds for them for the periods specified in the compliance specification.

Respondent's Operation at the Facility

On August 15, 1991,[2] Respondent, by Gina Lieb, its owner, executed an agreement to be bound by the terms of a collective-bargaining agreement between the Union and Associated General Contractors of America and Construction Industry Council (the Agreement), which was effective for the period June 1, 1990, through April 30, 1993. Gina Lieb's signature to be bound by the agreement states that it shall only apply to Respondent for work performed at the jobsite. The first nine pages of the agreement define the Union's jurisdiction. Working foreman are included in the unit pursuant to the agreement, and article 8 states that from 4 to 15 employees ''shall be under the direction'' or ''under the direct supervision'' of the labor foreman, the agreement's term for a working foreman. Fred Lieb (Lieb), Respondent's superintendent, and the individual who was in charge of Respondent's operation at the jobsite, testified that at prevailing rate jobs such as the Westinghouse job involved here, the laborers and the labor foremen receive the same wages. The agreement, at article 30, provides that Respondent shall make specified contributions per week to the Health Benefit Fund, the Pension Fund, the Training/Educational Fund, the

[1] At the hearing, counsel for the General Counsel amended the compliance specification to exclude three employees, Andrew J. Hull, James Knott, and Ronald Smith.

[2] Unless indicated otherwise, all dates referred to here relate to the year 1991.

L.E.C.E.T. fund, and the Savings Fund ''for all employees covered by this Agreement.''

The Board's Regional Office determined the figures in the compliance specification from Respondent's payroll records at the jobsite from August 1991 through September 1992. All the individuals set forth in the compliance specification appear on these payroll sheets with the title ''Laborer,'' ''Union Labor,'' or ''Premium Labor'' in the column entitled ''Work Classification.'' Lieb testified that the work classification of the three individuals being litigated here was listed as laborer ''for administrative reasons. They were all making the same money and it was just as easy to put laborer down.'' He considered these three individuals to be foremen and supervisors within the meaning of the Act, not laborers.

The jobsite was an area of about 10 acres that had previously been a papermill. The contract had been awarded by the New York State Environmental Conservation Department to decontaminate the area. The number of employees that Respondent maintained at the jobsite (in all job classifications) ranged from 16 to 52. The job was a hazardous waste cleanup and Respondent's employees were to clean the sludge out of the ponds on the jobsite that had been contaminated with PCB. Lieb was in overall charge of the Respondent's operation at the jobsite. Below him was James Knott, the project manager, who has ''Premium Labor'' next to his name on Respondent's certified payroll under work classification; Tracey, Suarez, and Brown are below Knott in the hierarchy. Below them are the laborers. With the exception of their first 5 or 6 weeks of employment at the jobsite when their work classification was listed as laborer, Tracey and Suarez' work classifications were listed as premium labor on Respondent's payroll. Brown's work classification is also usually listed as premium labor.

Pat Galietta, who was employed at the jobsite as a laborer for about 10 days, and is a union member, testified that he has occupied the position of working foreman, although not at the jobsite. In that position, he took direction from either the superintendent or the general foreman, and was in charge of a crew of from 5 to 10 employees: ''you would be in charge of the operation, what they're going to do for the day; that you would direct the men, what they had to do.

Lieb testified that they usually began the day with a meeting attended by Westinghouse's personnel together with he and his foremen, including Brown, Tracey, and Suarez. At these meetings, the Westinghouse representatives told Lieb and his foremen what work they were to perform that day. The foremen and the employees then had a safety meeting, at the conclusion of which they went to the de-con trailer, got dressed, and went to work.

Tracey Brown

Lieb testified that Brown was a building foreman who was in charge of the crew of two or three employees that was putting up the metal tents at the jobsite. He had laborers, ironworkers, and, occasionally, carpenters working for him. Either Lieb or the Westinghouse employees told him what had to be done, and Brown's task was to see to it that his men did the work. Most of the time, he simply watched to be sure that the work was being properly performed. He occasionally however performed physical work if he had to explain something or assist one of the employees. Galietta testified that Brown directed the work of laborers constructing the tents at the jobsite. He wore a tool pouch and either worked with the tools or directed the employees.

Carl Suarez

Lieb testified that Suarez was the foreman for the three or four employees (laborers and operating engineers) involved with the assembly of the water treatment plant at the jobsite. The water treatment plant pumped the water out of the ponds and filtered and treated the water to an acceptable standard. He was there to make sure that the job ran smoothly and that the pipes were not leaking. He told the employees what work had to be done and when to do it. He would generally assign laborers to work on the pipes, but, at times, he assisted with the work.

Wendell Tracey

Lieb testified that Wendell Tracey was also a foreman in charge of four to six employees at the screening plant at the jobsite. The contract required that rocks be separated from the dirt. The dirt went through a large screening plant and the employees' job was to watch to be sure that the machine was properly screening out the rocks; ''there was no physical labor because the plant did all the work.'' He testified that Tracey' job was to: ''Stand there and make sure it got done. That's the way Westinghouse wanted it.'' Galietta testified that he worked on this operation with Tracey; he reported to him in the morning, and Tracey told him what he would be doing that day.

Analysis

Respondent does not deny its liability to the funds here for 12 named employees. It does deny liability for Brown, Suarez, and Tracey on the ground that they are supervisors within the meaning of the Act. Clearly, this is Respondent's burden, *Health Care & Retirement Corp. of America*, 306 NLRB 63 (1992); even more so as this is a backpay hearing where the burden of mitigating the amount owed falls on Respondent. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963).

There was a minimal amount of testimony here that Brown, Suarez, and Tracey were supervisors within the meaning of the Act. There was no evidence that they could hire, fire, or effectively recommend such or, in any way, affect the employment status of the other employees. The only evidence adduced to establish supervisory status was that they directed the work of the employees under them, numbering from two to six. They told the employees working for them what work they would be performing, but they are actually just telling the employees what the Westinghouse representatives had told them earlier that morning. It appears to me that this ''supervisory authority'' is of a strictly routine nature and does not involve the use of independent judgment as is required by Section 2(11) of the Act. *Tucson Gas & Electric Co*., 241 NLRB 181 (1979). As the court stated in *NLRB v. Security Guard Service*, 384 F.2d 143, 147 (5th Cir. 1967): ''Moreover, the statutory words 'responsibility to direct' are not weak or jejune but import active vigor and potential vitality.'' Although the work being performed by Respondent's employees at the jobsite involved hazardous materials and required them to be attentive to safety rules, it re-

quired little direction. Further, there were three other individuals, Lieb, Hull, and Knott, present at the jobsite to supervise the work of the employees. I therefore find that Respondent has failed to establish that Brown, Suarez, and Tracey are supervisors within the meaning of the Act.

Even if I had found that they were supervisors within the meaning of the Act, Respondent would be liable for the payments to the funds on their behalf. They were working foremen, or labor foremen, and were covered by the agreement that Respondent agreed to be bound by. As the Board stated in *Gratiot Community Hospital*, 312 NLRB 1075 fn. 2 (1993): ''We have held that when parties to a collective-bargaining relationship, as here, have voluntarily agreed to include supervisors in a unit, the Board will order the application of the terms of the collective-bargaining agreement to those supervisors.'' As Respondent agreed to be bound by the terms of the agreement, it is obligated to make the specified payments to the funds for the working foremen as well as the other employees.

ORDER[3]

The Respondent, F. G. Lieb Construction Company, Cincinnatus, New York, its officers, agents, successors, and assigns, shall pay to the following funds the amounts set forth opposite their names, with interest pursuant to *Merryweather Optical Co*., 240 NLRB 1213 (1979):

Health Benefit Fund	$33,281.46
Pension Fund	37,907.00
Training/Education Fund	20,612.09
L.E.C.E.T. Fund	757.29
Savings Fund	30,368.00

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.